



**INDIANA COURT OF APPEALS  
ORAL ARGUMENT AT A GLANCE  
PLAINFIELD HIGH SCHOOL**

***David Schlotman v. Taza Café D/B/A Gyro Joint***

**Appeal from:**  
Marion Superior Court  
The Honorable John F.  
Hanley, Judge

**Oral Argument:**  
Tuesday, May 22, 2007  
1:00—2:00 p.m.  
30 minutes each side

***The Indiana Court of Appeals is asked to examine several questions in two areas of law in this appeal of summary judgment:***

**NEGLIGENCE**

Does the proprietor of a carry-out restaurant have a duty to protect from criminal activity a patron who is attacked while eating his food at a table the proprietor placed outside the restaurant?

Was an attack on a patron outside a restaurant foreseeable to the restaurant proprietor when the restaurant has experienced criminal activity in recent years, the surrounding area has a number of bars and intoxicated people, and there have been fights in the area, but there have been no attacks on patrons eating outside the restaurant?

Does the proprietor assume a duty to protect his patrons from criminal activity by placing a table outside his restaurant for his patrons to use?

**EVIDENCE**

Is information from a website compiling reports of police runs to the area hearsay that cannot serve as a basis for a summary judgment?

*David Schlotman v. Taza Café D/B/A Gyro Joint***CASE SYNOPSIS****Facts and Procedural History**

On September 4, 2004, Schlotman bought food at a carry-out restaurant on Broad Ripple Avenue in Indianapolis called the Gyro Joint. He stepped outside where the owner of the restaurant, Rageh Hefni, had placed a table. The restaurant has no interior seating. There were no chairs at the table, and Schlotman sat on the table to eat his food.

He was approached by some individuals in a white SUV. They appeared intoxicated and demanded Schlotman's food. Schlotman told Hefni the individuals were harassing him. He asked Hefni to "hook [one of the individuals] up with some food," (Appellant's App. at 62), and Hefni said "I'm not hooking anybody up. Take it outside." (*Id.*). The individuals left, and Schlotman returned to the sidewalk to continue eating. The individuals went around the block, then returned and hit Schlotman in the face with a whiskey bottle.

Schlotman sued Gyro Joint, alleging it had a duty to protect him. The court granted summary judgment for the Gyro Joint. Schlotman argues on appeal the attack on him was foreseeable and/or the Gyro Joint assumed a duty to protect him.

**Parties' Arguments*****Evidence***

Schlotman provided evidence of criminal activity at or near the restaurant, which he would use to show the attack on him was foreseeable to the proprietor of the restaurant. Much of this evidence was in the form of records of police runs Schlotman obtained from a city website.

Gyro Joint argues this evidence should not be considered on appeal, as it is hearsay that could not be admitted at trial. Schlotman responds questions about admissibility of evidence should not be considered at the summary judgment stage, and even if the website records are not considered, he provided enough other evidence of criminal activity to avoid summary judgment.

***Negligence***

A proprietor of a business sometimes has a duty to protect his patrons from foreseeable criminal acts. The attack was foreseeable to Gyro Joint, Schlotman argues, because there had over the years been so many other criminal incidents, such as assaults, fights, thefts, property damage in the area of the restaurant. Gyro Joint says the attack was not foreseeable because none of the prior incidents involved an attack on a patron of the restaurant. To establish "foreseeability" based on prior incidents, those incidents must be "similar" to what happened

## Case Synopsis (*continued*) and Glossary of Terms

to the plaintiff, and the incidents on which Schlotman relies were not similar enough.

Schlotman also argues that even if Gyro Joint did not have a duty too protect him based on the foreseeability of the attack, it took such a duty upon itself by providing its patrons an outdoor area where they could eat their food. Gyro Joint argues merely placing a table on the sidewalk does not amount to the kind of “affirmative step” to provide for a patron’s safety that is required for a such a duty to be found.

### GLOSSARY OF TERMS

**Admissible Evidence:** Evidence the trial judge finds useful in helping the trier of fact (a jury if there is a jury, otherwise the judge), and that cannot be objected to on the basis it is irrelevant, immaterial, or violates the rules against hearsay and other objections.

**Affidavit:** 1) any written document in which the signer swears under oath that the statements in the document are true.

**Defendant:** The party sued in a civil lawsuit or the party charged with a crime in a criminal prosecution.

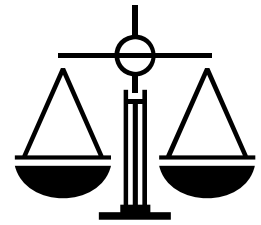
**Plaintiff:** The party who initiates a lawsuit by filing a complaint against the defendant(s) demanding money damages, performance and/or court determination of rights.

**Deposition:** The taking and recording of testimony of a witness under oath before a court reporter in a place other than the courtroom and before trial. A deposition is part of permitted pre-trial “discovery” (investigation), set up by an attorney for one of the parties to a lawsuit demanding the sworn testimony of the opposing party (defendant or plaintiff), a witness to an event, or an expert the opposition intends to call at trial.

**Duty:** A legal obligation, the breach of which can result in liability. In a lawsuit a plaintiff must claim and prove that there was a duty by defendant to plaintiff. This can be a duty of care in a negligence case.

**Foreseeability:** Reasonable anticipation of the possible results of an action, such as what may happen if one is negligent.

**Hearsay:** Second-hand evidence in which the witness is not telling what he/she knows personally, but what others have said to him/her. The basic rule is that testimony or documents that quote persons not in court are not admissible. Because the person who supposedly knew the facts is not in court to state his/her exact words, the trier of fact cannot judge the demeanor and credibility of the alleged first-hand witness, and the other party’s lawyer cannot cross-examine (ask questions of) him or her.

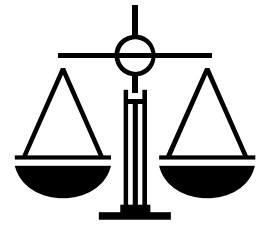


**Opinion in this case expected:**  
By end of summer 2007

*Mr. Cavanaugh will be informed when the Court has issued an opinion in this case. Check the Court’s website to read the opinion.*

**For more information, please visit the Indiana Court of Appeals website at <http://www.in.gov/judiciary/appeals/>**

**Or contact:**  
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## GLOSSARY OF TERMS (*continued*)

**Invitee:** A person who comes onto another's property, premises or business establishment upon invitation. The invitation may be direct and express or "implied," as when a shop is open and the public is expected to enter to do business there. An invitee is entitled to assume safe conditions on the property or premises, so the owner or proprietor might be liable for any injury suffered by the invitee while on the property due to an unsafe condition which is not obvious to the invitee (a latent defect) and not due to the invitee's own negligence.

**Admission:** A statement made by a party to a lawsuit or a criminal defendant, usually prior to trial, that certain facts are true. An admission is not to be confused with a confession of blame or guilt, but admits only some facts. In civil cases, each party is permitted to submit a written list of alleged facts and request the other party to admit or deny whether each is true or correct. Failure to respond in writing is an admission of the alleged facts and may be used in trial.

**Summary Judgment:** A ruling that no factual issues remain to be tried and therefore a cause of action or all causes of action in a complaint can be decided upon certain facts without trial. A summary judgment is based on a motion by one of the parties that contends all necessary factual issues are settled or so one-sided they need not be tried. The theory behind the summary judgment process is to eliminate the need to try settled factual issues and to decide without trial one or more causes of action in the complaint.

**Negligence:** Failure to exercise the care toward others that a reasonable or prudent person would do in the circumstances, or taking action which such a reasonable person would not. Negligence is accidental as distinguished from "intentional torts" (assault or trespass, for example) or from crimes, but a crime can also constitute negligence, such as reckless driving. In making a claim for damages based on an allegation of another's negligence, the injured party (plaintiff) must prove: a) that the party alleged to be negligent had a duty to the injured party, b) that the defendant's action (or failure to act) was negligent-not what a reasonably prudent person would have done, c) that the damages were caused by the negligence. An added factor in the formula for determining negligence is whether the damages were "reasonably foreseeable" at the time of the alleged carelessness.

**Premises Liability:** Liability arising from injuries or losses occurring on one's premises.

Court of Appeals opinions are available online at <http://www.in.gov/judiciary/opinions/appeals.html>.

- Locate archived opinions at <http://www.in.gov/judiciary/opinions/archapp.html>

## **TODAY'S PANEL OF JUDGES**

### **Hon. Edward W. Najam, Jr. (Marion County), Presiding**

- Judge of the Court of Appeals since December 1992

**Edward W. Najam, Jr.** graduated from the Indiana University High School in Bloomington, where he grew up, and attended Indiana University at Bloomington. At I.U. he earned a B.A. in political science, with highest distinction, in 1969, was elected to Phi Beta Kappa, and was elected Student Body President. Judge Najam earned his J.D. from Harvard Law School in 1972.

After admission to the Bar, he was Administrative Assistant to the Mayor of Bloomington for two years and an attorney in private practice for eighteen years. He served as a member of the Civil Justice Reform Act Advisory Group and the Local Rules Advisory Committee of the United States District Court for the Southern District of Indiana. He was a member of the Bloomington Rotary Club, the Greater Bloomington Chamber of Commerce, and President of the Monroe County Family YMCA Board of Directors.

As Chair of the Appellate Practice Section of the Indiana State Bar Association, he initiated the Appellate Rules Project, which culminated in a complete revision of the Indiana Rules of Appellate Procedure. In 2001, he organized and co-chaired "Caught in the Middle: A National Symposium on the Role of State Intermediate Appellate Courts," attended by judges from twenty-two states, the first such national conference. He has served as a member of the Indiana Supreme Court Committee on Rules of Practice and Procedure (1995 to 2005) and the Indiana Supreme Court Judicial Technology and Automation Committee (1999 to 2005), and he represents the judiciary on the Indiana Department of Homeland Security Counter-Terrorism and Security Council.

Judge Najam is a member of the American, Indiana, and Monroe County Bar Associations, a graduate of the Indiana Graduate Program for Judges, a Fellow of the Indiana and Indianapolis Bar Foundations, a member of Phi Delta Phi legal fraternity, and an Eagle Scout.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

**Today's oral argument is the 188th case the Court of Appeals has heard "on the road" since early 2000.**

**Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.**



## TODAY'S PANEL OF JUDGES

### **Hon. Melissa S. May (Vanderburgh County), Presiding**

- Judge of the Court of Appeals since April 1998

**Melissa S. May** was appointed to the Court of Appeals in April of 1998. Judge May was born in Elkhart, Indiana. She graduated from Indiana University-South Bend with a B.S. in 1980 and from Indiana University School of Law-Indianapolis with a J.D. in 1984.

Between law school and her appointment to the Court, Judge May practiced law in Evansville, Indiana, focusing on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, and as co-chair of the Futures Taskforce. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994-1999 and has been the co-chair of ICLEF's Indiana Trial Advocacy College from

2001 to 2005. She is a fellow of the Indiana Bar Foundation, as well as for the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

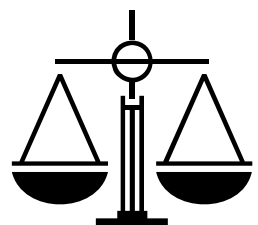
From 1999 till December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission. In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee.

In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course. Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

Judge May was retained on the Court of Appeals by election in 2000.

The 15 members of the Indiana Court of Appeals issue some 2,500 written opinions each year.

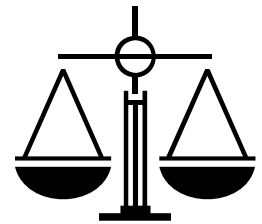
The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



## TODAY'S PANEL OF JUDGES

### Hon. Paul D. Mathias (Allen County)

- Judge of the Court of Appeals since March 2000



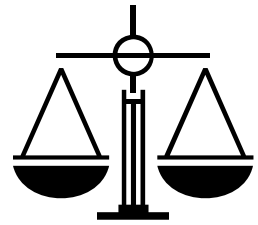
**Paul D. Mathias** was appointed to the Court by Governor Frank O'Bannon in March, 2000. Judge Mathias is a fifth generation Hoosier and grew up in Fort Wayne. He graduated from Harvard University, *cum laude*, in 1976 and from Indiana University School of Law – Bloomington in 1979, where he was a member of the law school's Sherman Minton Moot Court Team and *The Order of Barristers*.

Judge Mathias practiced law for six years in Fort Wayne, concentrating in construction law, personal injury and appellate practice. In 1985, he was appointed Referee of the Allen County Small Claims Court, where he

served until his appointment as Judge of the Allen Superior Court – Civil Division by Governor Evan Bayh in 1989.

Judge Mathias served as an officer of the Indiana Judges Association from 1993 to 1999 and as its president from 1997 to 1999. He received the Centennial Service Award from the Indiana State Bar Association in 1996, and a Sagamore of the Wabash Award from two governors.

Judge Mathias, who was retained on the Court of Appeals by election in 2002, is married and has two sons.



## ATTORNEYS FOR THE PARTIES

**For Appellant, David Schlotman:**  
**Timothy Devereux**  
**Hensley Legal Group**  
**Indianapolis**

**Timothy Devereux** relocated to Indiana in January 2005 in order to head the Hensley Legal Group's Litigation Section. Immediately prior, Mr. Devereux was a litigation consultant on a mass tort case in South Texas involving over 2000 claimants.

Mr. Devereux graduated from the University of Denver College of Law in 1988, then joined Colorado's largest plaintiffs firm, engaging in a national and international litigation practice emphasizing products liability, daycare sexual assault matters, and catastrophic personal injury cases. Mr. Devereux also served on the Board of Directors for the Colorado Trial Lawyer's Association's Political Action Committee.

In 1993, Mr. Devereux joined a law firm in Illinois where he continued to focus on personal injury matters, including a significant wrongful death matter against Domino's Pizza involving the murder of a franchisee's delivery driver. Mr. Devereux has also served as the Vice President and General Counsel for a company engaged in telecommunications and health care and co-founded two technology companies which develop health care analyses software for use in complex civil medical litigation, such as the national tobacco litigation and pharmaceutical products liability cases.

Mr. Devereux is licensed to practice before the United States Supreme Court and in the states of Texas, Illinois, Colorado and Indiana, as well as the Tenth Circuit Court of Appeals and the United States District Courts of Colorado, Indiana and Illinois.

**For Appellee, Taza Café D/B/A Gyro Joint:**  
**John Mervilde**  
**Meils Thompson Dietz & Berish**  
**Indianapolis**

**John Mervilde** is an attorney with the Indianapolis law office of Meils, Thompson, Dietz & Berish. Mr. Mervilde graduated from Indiana University in 1996 with a Bachelor of Arts degree in Political Science and History and earned his law degree from the University of Notre Dame in 1999.

Mr. Mervilde's law practice primarily involves litigation on behalf of defendants in civil lawsuits in the areas of personal injury, construction defects, insurance coverage, and employment.

Mr. Mervilde lives in the Indianapolis neighborhood of Irvington with his wife and son.